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(1)



In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1013

ROBERT R. HARE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1014

JOHN M. HARE, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1015

CLINTON L. HARE, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals
(R. 198-203) has not yet been reported.

JURISDICTION

The judgments of the circuit court of appeals were entered on February 8, 1946 (R. 204-206), and a petition for rehearing was denied on February 26, 1946 (R. 279). The petition for writs of certiorari was filed March 28, 1946. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support the verdicts.
2. Whether acquittal of the corporation of which petitioners were officers and directors requires reversal of petitioners' individual convictions.

STATEMENT

An indictment in six counts was returned in the United States District Court for the Southern District of Indiana against the three petitioners, J. C. Perry and Company, a corporation of which petitioners were officers and directors (R. 20), and one Rozelle (R. 1-10). The first five counts charged that the five named defendants sold specified quantities of whiskey in Indiana to certain named individuals at prices in excess of the maximum fixed by O. P. A. regulations (R. 1-5). The sixth count charged a conspiracy among the same defendants to violate maximum price regulations in the sale of liquor (R. 6-10).

Rozelle pleaded guilty and testified for the Government (R. 70). The corporation was acquitted and petitioners were convicted (R. 148). Fines totalling \$25,000 were imposed against each of the petitioners. In addition, Robert Hare was sentenced to imprisonment for a total of three years, John Hare to two years, and Clinton Hare to one year and one day. (R. 151-155.) On appeal, the judgments were affirmed (R. 204-206).

The evidence for the government may be summarized as follows:

John Hare was president, Clinton (Larue) Hare, treasurer, and Robert Hare, secretary, of J. C. Perry and Company (R. 20, 96-97). Robert Hare was in active charge of the liquor department of the corporation (R. 109). Rozelle was employed by the company as a liquor salesman (R. 70).

In March of 1943, Robert Hare told Rozelle that the company had been "caught" with several hundred barrels of whiskey for which they had paid more than the ceiling price subsequently fixed on bulk whiskey. He asked Rozelle whether he could dispose of the liquor. (R. 72.) Rozelle spoke with Clark, who represented a group of tavern keepers in Ohio, and offered to sell him liquor at \$35 a case. After a conference with Rozelle and Robert Hare, Clark purchased 1,500 cases at \$35 per case (R. 53). The ceiling price of the liquor was \$18.38 per case (R. 22, 58).

Subsequently, Clark purchased other liquor through Rozelle at \$37 per case (R. 58). In all, the pool represented by Clark paid \$342,922.16 for liquor, the ceiling price of which was \$171,871.38 (R. 60, 63).² Payments on these transactions were in cash (R. 57, 58), or in part by check, to Rozelle, who would then cash the check and turn the money over to Robert Hare (R. 73). At one time, Rozelle received \$92,500 in cash. Because his wife was afraid to keep that money in the house over night, he called Robert Hare, and when he could not reach Robert, John Hare. John kept the money, and the next morning gave it to Rozelle, who then turned it over to Robert. (R. 73, 83.)

One hundred and sixty-eight thousand dollars, representing net proceeds on the excess over ceiling prices in the sales to Clark, was divided equally among Rozelle and the three Hare brothers (R. 78-79, 84-85). The final division of the profits was made in January 1944 (R. 95), but the Hares did not disclose these sums in their estimated income tax returns until September 1, 1944 (R. 84), after an investigation had been started by government authorities (R. 77-78). John Hare asked Rozelle to account for the full

² Clark testified he purchased 9,351 cases (R. 60). The ceiling price was \$18.38 per case (R. 22).

sum of \$168,000, but Rozelle refused to do so (R. 86).

Rozelle also, through introductions effected by various persons, sold warehouse receipts for bulk liquor to one McBride for \$36,000, of which he received \$30,000 (R. 35-36, 38-39, 40, 75). He turned that money over to Robert Hare (R. 76). Perry and Company billed the purchaser at the ceiling price, approximately \$6,000 (R. 45).

Seven Indiana liquor dealers testified that they purchased liquor through Rozelle at various times from January to March 1944 at prices substantially above ceiling, paying the ceiling price by check to J. C. Perry and Company, and the balance in cash to Rozelle or the man who accompanied him (R. 23-24, 25-26, 27-28, 29, 30, 31-32, 33-34). Sales to five of these witnesses were made the basis of the five substantive counts of the indictment (cf. R. 1-5 with R. 23-30).

Sales to all seven witnesses totaled approximately \$20,000 over the ceiling price (see Pet. 18-19). Robert Hare told Rozelle to "handle" the cash, and Rozelle would place the money in envelopes to be put in the company vault (R. 77). Rozelle testified that out of this money there would be deducted various expenses, including the cost of warehouse receipts, since the whiskey "cost a lot more than shown on paper" (R. 76, 77). The

profits that remained were divided equally among Rozelle and the three Hares (R. 77). In all, each of the four received "a total of probably \$2,500" from the "Indiana sales of the 1,500 cases" (R. 82-83). This was not part of the \$42,000 received by each of the Hares on the sales to Clark (R. 83).

ARGUMENT

1. Petitioners challenge the sufficiency of the evidence, particularly as to Clinton and John Hare, on the ground that the only evidence of their participation in the conspiracy and the substantive charges was their receipt of one-fourth of the illegal profits (Pet. 9-10, 30-33).

As to Robert Hare, the evidence is clear that he was the directing voice in the general conspiracy. On the substantive counts there was evidence that he purchased the liquor for these sales above ceiling prices, that he knew of the delivery of this whiskey, and that he directed Rozelle as to disposition of the cash received (R. 48, 76-77).

The conviction of the other two brothers, it is true, rests largely on proof of the fact that they shared equally in the proceeds, although there is also evidence that John Hare kept \$92,500 for Rozelle overnight, and that he took part in discussion at the time a ceiling price was first placed on bulk whiskey (R. 73, 109-110). It was, however, clearly in the

jury's province to infer that these two defendants, who stated that they took no active part in the liquor department of the company (R. 109, 122), were not given one-fourth of the proceeds, amounting to more than \$42,000, without an agreement making them parties to the venture.

As to the substantive counts, petitioners assert (Pet. 9-10, 16-22) that the \$2,500 each received could be accounted for from transactions with witnesses not mentioned in the first five counts of the indictment who testified to sales totalling more than \$13,000 above ceiling prices. This argument, however, ignores that part of Rozelle's testimony in which he stated that certain expenses were deducted from the cash received for the excess over the ceiling price before there was a division of the profits (R. 76-77). Rozelle testified that \$2,500 represented one-fourth of the net proceeds "from the Indiana sales of the 1,500 cases" (R. 83). Since the two witnesses not mentioned in the first five counts testified to sales of only 732 cases (R. 31-34; see Pet. 19), it is evident that the division of profits could not have related to those sales alone, but must have included the sales set forth in the substantive counts.

2. Petitioners also argue (Pet. 34-37) that, since the indictment named the corporation as

a defendant, and the Government sought to prove that petitioners were acting on behalf of the corporation which owned the liquor in making the illegal sales, the acquittal of the corporation necessitates reversal of their individual convictions. Petitioners admit that the indictment is in terms broad enough to cover activities by them individually (Pet. 34), but argue that the Government is bound by its theory that petitioners were acting on behalf of the corporation.³ Petitioners themselves offered evidence to prove that the excess above ceiling price was not credited to the corporation (R. 113-114, 115, 122). In substance their argument is that because the Government thought they were acting for the corporation in making the sales, they must be acquitted on proof that they merely used the corporation as a means of making illegal sales for their own personal profit. Manifestly, however, the fact that one defendant is shown not to be guilty as charged does not necessitate acquittal of the others.

CONCLUSION

The decision below is correct and the case presents no conflict of decisions or question of

³ In this connection, petitioners seek to amplify the record to include the opening statement by the assistant United States attorney. The statement has no significance beyond showing that the Government thought petitioners were acting not only for themselves but also for the corporation in making the illegal sales.

general importance. We therefore respectfully submit that the petition for writs of certiorari should be denied.

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APRIL 1946.